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AMERICAN COUNCIL OF LIFE INSURERS
FINANCIAL SECURITY FOR LIFE

August 16,2004

Via E-Mail

Office of the Comptroller of the Currency
250 E Street, S.W.
Mail Stop 1-5
Washington, D.C. 20219

Re: Docket Number 04-16

Jennifer J. Johnson
Secretary, Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, NW
Washington, D.C. 20551

Re: Docket No. R-1203

Robert E Feldman
Executive Secretary
Attention: Comments
Federal Deposit Insurance Corporation
550 17th Street, NW
Washington, D.C. 20429

Re: RIN 3064-AC73

Regulation Comments
Chief Counsel's Office
Office of Thrift Supervision
1700 G Street, NW
Washington, D.C. 20552

Re: Docket No. 2004-31

Becky Baker
Secretary of the Board
National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314-3428

Re: Fair Credit Reporting Affiliate Marketing Regulations

Ladies and Gentlemen:

The American Council of Life Insurers ("ACLI") is submitting this comment to the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration (the "Agencies") in connection with the request for public comment on the proposed rules implementing § 214 of the Fair and Accurate Credit Transactions Act of 2003 ("FACT Act") ("§ 214"). 69 *Fed. Reg.* 42502 (July 15, 2004).

ACLI is the principal trade association of life insurance companies whose 383 member companies account for 73 percent of the assets of legal reserve life insurance companies, 70 percent of life insurance premiums and 77 percent of annuity considerations in the U.S. ACLI members are also major participants in the pension, long-term care insurance, disability income insurance and reinsurance markets. ACLI member companies actively engage in marketing activities with existing and prospective policyholders, insureds and annuitants. Accordingly, ACLI and its member companies have a significant interest in the Agencies' proposals.

Summary

ACLI is concerned that in several instances the Agencies' proposed rules do not follow the language of § 214 of FACT Act and resulting new Fair Credit Reporting Act ("FCRA") § 624. In some instances the departures from the statute represent material differences that will have adverse effects on the insurance industry and its ability to serve its customers. For example, as explained in more detail below, the definition of "pre-existing business relationship" in the proposed rules deviates from the definition in § 214 in a number of ways. Most significantly, the definition in the proposed rules fails to include the statutory reference to the relationship between "a person's licensed agent" and a consumer. ACLI is also concerned that some of the proposed rules' departures from the statutory language broaden the scope of the requirements of § 214 and narrow the flexibility provided by Congress. ACLI believes that Congress intended to provide companies with flexibility to enable them to implement § 214 in the manner that they determine best meets the needs of their customers and prospects. We have indicated below several provisions of the proposed rules that we believe should be conformed to the statutory language of § 214.

ACLI believes that it is important that the Agencies' rules use the precise language of the statute. We request that the Agencies use the statutory language of § 214 when they adopt the final rules and not eliminate or add to the words Congress carefully considered and enacted. Similarly, we urge the Agencies to eliminate any restrictions or requirements in the proposed rules that are not expressly set forth in § 214.

In response to the Agencies' requests for comment as to whether the notice and opt-out requirements of § ___.20 of the proposed rules should apply to instances where there is so-called "constructive sharing" of eligibility information, ACLI strongly objects to subjecting such solicitations to the proposed rules. Section 214 clearly contemplates that such targeted solicitations are permitted and are not subject to notice and opt-out provisions.

In response to the Agencies' requests for comment on whether there is any need to delay the compliance date beyond the effective date to permit financial institutions to incorporate the affiliate marketing notice into their next annual Gramni-Leach-Bliley Act ("GLB Act") notice, ACLI believes there is such a need both because financial institutions often stagger the mailing of their GLB notices throughout the year and because they need adequate lead time to implement all the systems and operational changes necessitated by § 214. ACLI urges that the compliance date be 18 months after the effective date.

Also, to avoid any confusion as to the applicability of state laws, ACLI urges amendment to the proposed rules to expressly provide that new FCRA § 624 provides a uniform national standard for the exchange and use of information to make solicitations for marketing purposes and that no state may impose requirements or establish prohibitions relating to the exchange and use of information to make a solicitation for marketing purposes, as provided in FCRA § 625(b).

Discussion

Scope and Exceptions to the Notice and Opportunity to Opt-Out Requirements

Section ___.20(c)(1) of the proposed rules provides:

> (c) Exceptions. The provisions of this subpart do not apply if you use eligibility infomation you receive from an affiliate:
>
> > (1) To make or send a marketing solicitation to a consumer with whom you have a pre-existing business relationship … 69 *Fed. Reg.* at 42521, 42526, 42531, 42535,42539.

The corresponding provision of FACT Act § 214 provides:

> (4) Scope. This section shall not apply to a person—
>
> > (A) using information to make a solicitation for marketing purposes to a consumer with whom the person has a preexisting business relationship; 15 U.S.C. § 1681s-3(a)(4)(A).

FACT Act § 214 excludes from the scope of new FCRA § 624 *any* person performing the functions specified in the exceptions, reflecting Congressional intent that the exceptions be applicable to *either* the affiliate disclosing eligibility information or the affiliate receiving and using eligibility infomation. However, the language of § ___.20(c) of the proposed rules appears to make the exceptions applicable only to affiliates that receive and use eligibility information. This apparent narrowing of the reach of exceptions gives rise to concern that the proposed rules may be interpreted in a manner that generally alters the scope of new FCRA § 624. Given the express language of § 214, reflecting clear Congressional intent, and the potential for unintended adverse consequences, we request that throughout § ___.20(c) the Agencies use the statutory language of § 214 that was carefully considered and enacted by Congress.

Similarly, § ___.20(c)(5) of the proposed rules provides that the rules do not apply if a company uses information in response to an "affirmative" authorization or request by the consumer. Nothing in the statute requires that the consumer's request be "affirmative." 15 U.S.C. § 1681s-3(a)(4)(E). By using the term "affirmative," the Agencies have created uncertainty as to what may constitute an authorization or request by the consumer. This is another example of how the proposed rules' departure from the express language of § 214 will make it more difficult for companies and consumers to conduct business. ACLI again urges the Agencies to follow the language of the statute.

Preemption

As noted above, ACLI believes that the proposed rules should be amended to expressly provide that new FCRA § 624 provides a uniform national standard for the exchange and use of information to make solicitations for marketing purposes and that no state may impose requirements or establish prohibitions relating to the exchange and use of information to make a solicitation for marketing purposes, as provided in FCRA § 625(b).

Compliance Date

As also noted above, ACLI believes there is a need to delay the compliance date beyond the effective date so that financial institutions may incorporate the affiliate marketing notice into their next annual GLB Act notices as permitted under FACT Act § 214 and §§ ___.21(b)(2), ___.22(b)(4) of the proposed rules and implement all the requirements imposed under § 214. Financial institutions often stagger the mailing of their GLB notices throughout the year. As a result, the date on which they would ordinarily provide their next annual GLB notice very well may be after the required effective date of the rules. Since the initial deadline for provision of the GLB notices was in July, a number of financial institutions are likely to mail their annual notices in June. If the final rules were to be effective and require compliance by March 4, 2005, they would require financial institutions that generally send their annual GLB notices later in the year either to send a separate affiliate marketing notice or to move up their annual GLB notices. Both of these scenarios would necessitate unnecessary additional systems modifications and administrative costs and burdens to come into compliance with the rules.
We estimate that it may take some companies in excess of a year to review their information sharing and affiliate marketing policies and practices to determine whether notice and opt-out would be necessary, implement necessary operational and systems changes, design and provide notices and opt-out forms and record opt-outs that are received. Accordingly, in order to give financial institutions adequate time to implement the changes called for in § 214 and to coordinate their affiliate marketing and GLB notices, ACLI urges that the compliance date for the final rules be 18 months after the effective date.

Responsibility for Providing Notice and Opportunity to Opt Out

Section 214 provides that a company that receives from an affiliate information that would otherwise be a consumer report may not use the information to make a solicitation for marketing purposes to a consumer unless the consumer is informed that the information may be disclosed to such persons and the consumer is provided an opportunity to prohibit the making of such solicitation. Section ___.20 of the Agencies' proposed rules, however, requires the affiliate which communicated information about its consumer to provide the notice required by § 214 because that person would likely provide the opt-out notice under § 603(d) of the FCRA and other disclosures required by law.
The Agencies also suggest that consumers may not expect to receive opt-out notices from companies that have received information from affiliates. However, the Agencies cite no empirical evidence in support of this conclusion.

ACLI believes that the proposed rules do not accurately reflect the language of the statute and the intent of Congress. Section 214 requires only that notice be sent and does not specify who must send the notice. This provision was drafted to permit companies to structure the manner in which they wish to send required notices to meet their unique situations and needs. It often is more appropriate and convenient from an operational standpoint for companies that receive information from affiliates to send required notices directly to consumers rather than to rely upon their affiliates to send the notices.

To require a company's affiliates to send the § 214 notice will be operationally cumbersome for many companies and will impose an undue burden on such entities.

The Agencies' proposals impose a responsibility on companies neither provided nor intended by Congress. Section 214 limits the ability of a company that receives personal information from an affiliate to use such information to make a marketing solicitation to consumers. Section 214 imposes no limitation or obligation whatsoever on the affiliate disclosing the eligibility information. Nevertheless, the Agencies' proposals impose a responsibility on the affiliate despite the fact that Congress imposed no such obligation.

The intended flexibility of § 214 is quite evident when one compares its language with that of the privacy provisions of the GLB Act. Section 502(b)(1) of the GLB Act expressly imposes a notice requirement on the financial institution that intends to disclose nonpublic personal information to a nonaffiliated third party. 15 U.S.C. § 6802(b)(1). By contrast, § 214 of the FACT Act makes no mention of which affiliate is to provide the notice. ACLI believes that this was a deliberate effort by Congress to permit companies to fashion programs that serve the best interests of consumers and the companies. Permitting the company making the marketing solicitation to provide the notice often provides consumers with better information as to which company will make the solicitation and how the consumer's information may be used. The decision as to who will provide the notice to consumers should be left to the discretion of companies themselves, just as § 214 provides. ACLI sees no reason why the Agencies should ignore the plain language of the statute. Accordingly, we urge that the Agencies' final rules restore the flexibility intended by Congress.

Pre-Existing Business Relationship

<u>Licensed Agents</u>

ACLI believes that the definition of "pre-existing business relationship" in the proposed rules departs in several important ways from the definition of "pre-existing business relationship" in § 214. The definition in § 214 provides that an existing business relationship is a relationship between a person, <u>or a person's licensed agent</u>, and a consumer based upon certain transactions specified in the statute. Inexplicably, the definition in the Agencies' proposed rules deletes the words "or a person's licensed agent." These words are critical for the insurance industry.

The insurance business is quite different from the types of businesses that are regulated by the Agencies. An insurance or annuity transaction typically involves a contract that remains in force for many years. During the life of the relationship, the insurer and licensed insurance agents may contact the consumer to provide information about the status of the policy or annuity, or to inform the consumer about added policy features, enhancements and other policies or services that may be of interest or benefit to the consumer. The Agencies' definition does not take into account the continuing and lengthy nature of the relationship that typically exists between the consumer, the insurer and the company's licensed insurance agents.

While licensed agents represent an insurer, often they are not company employees. Indeed, they often represent more than one company. By omitting the phrase "or a person's licensed agent" from the definition of "pre-existing business relationship" in the proposed rules, the Agencies have jeopardized the ability of a company's licensed agents to treat consumers they represent as customers with whom they have a pre-existing business relationship. We believe that it is imperative to include the phrase "or a person's licensed agent" in the definition to avoid disruption to the insurance industry. It would be contrary to the best interests of consumers to not include the statutory language in the definition of "pre-existing business relationship." Failure to do so could jeopardize the ability of licensed insurance agents to contact persons with whom they maintain relationships to provide them important information regarding existing insurance products and services and innovative, new products and services. Accordingly, as provided in § 214, consumers' relationships with companies' licensed agents should properly be regarded to be "pre-existing business relationships" under the Agencies' rules.

Contracts in Force

The proposed rules provide that a "pre-existing business relationship" includes a relationship between a person and a consumer based upon a financial contract in force "on the date on which the consumer is sent a solicitation." By contrast, the definition of "pre-existing business relationship" in § 214 requires only that the contract be in force. 15 U.S.C. § 1681s-3(d)(1)(A). The statute does not require that the contract must be in force on the date the solicitation is made. Section 214 provides that it does not apply to a person using infomation to make a marketing solicitation if the company has a pre-existing business relationship with the consumer. The literal reading of that provision, coupled with the statutory definition of "pre-existing business relationship," suggests that the contract between the company and the consumer is to be in force at the time the company uses the information rather than when the solicitation is sent. Because of inherent delays between the time information is processed and the tinie the solicitation may be sent, requiring a company to ensure that a contract is in force when the solicitation is sent will impose an undue burden on companies. By adding the requirement as to precisely when the contract must be in force, the Agencies' proposed rules again limit the flexibility that Congress provided to companies. The Agencies should adjust the proposed rules' definition of "pre-existing business relationship'' to maintain the flexibility Congress provided in this area.

"Constructive Sharing"

The Agencies request comment regarding whether, given the policy objectives of § 214, the notice and opt-out requirements of § ___.20 of the proposed rules should apply to instances where there is "constructive sharing" of eligibility information. In the preamble, "constructive sharing" is suggested to occur when a business sends its customers solicitations on behalf of its affiliate, the solicitations are based on criteria that include eligibility criteria specified by the affiliate, and the consumers' responses to the affiliate reveal eligibility infomation. ACLI strongly objects to the notion that such solicitations should be subject to the proposed rules. Section 214 clearly contemplates that targeted solicitations are permitted and are not subject to the notice and opt-out provisions.

In fact, Congressional intent in connection with this subject is reflected in the clear language of § 214, which expressly provides that its notice and opt-out requirements shall not apply to a person "using information to make a solicitation for marketing purposes to a consumer with whom the person has a pre-existing business relationship" or a person "using information in response to a communication initiated by the consumer." 15 U.S.C. § 1681s-3(a)(4). Congress intentionally placed no limitations on a company's ability to solicit its existing customers for marketing purposes in recognition of the many consumer benefits that devolve from such contacts. Moreover, it is clear that a consumer who requests information about a company's products and services is initiating a communication to the company. As a result of the consumer's request, the company may use infomation from its affiliate without regard to § 214.

Congress plainly intended to allow precisely the activity that the preamble suggests is an effort by affiliated companies to "seek to avoid providing notice and opt-out by engaging in the 'constructive sharing' of eligibility information to conduct marketing." 69 *Fed. Reg.* at 42507. The concept of constructive sharing is not relevant to targeted marketing. As illustrated above, such solicitations are contemplated and permitted by § 214. The underlying public policy rationale of Congress in this regard is clear. Using customer information a business already knows allows it to focus its solicitations on its customers who are most likely to be interested in the product or service offered. The result is less mail for consumers (particularly, mail about products or services in which they are not interested) and more efficient and cost-effective marketing for businesses, resulting in reduced costs that may be passed along to consumers in product or service pricing.

It is worth noting that the only information the affiliate receives as a result of such marketing is information that it needs to provide the product or service; and the affiliate only receives this information about those consumers who express an interest in the product or service. The express language of the FACT Act reflects recognition by Congress that allowing businesses with relationships to consumers to send them solicitations on behalf of affiliates is a win win: consumers receive communications from businesses they already know, about products in which they may reasonably be thought to be interested, and the marketplace is efficient. indeed, consumers are often disturbed if they are required to provide information that they assume the company already has. There is simply no reason, public policy or otherwise, and no basis in the FACT Act, for the Agencies to apply the requirements of proposed § ___.20 to this activity.

Solicitation

The proposed rules frequently use the term "solicitation," whereas § 214 frequently uses the term "solicitation for marketing purposes." ACLI believes that the different phrasing of § 214 has a particular meaning and that the statutory language should be included in the final rules.

Also, § ___.3(n) of the proposed rules defines "solicitation" as marketing initiated by a person to a particular consumer based upon eligibility information and intended to encourage the consumer to obtain such product or service. The statute, however, defines "solicitation" as "the marketing of a product or service initiated by a person to a particular consumer that is based upon an exchange of information" and "intended to encourage the consumer to purchase such product or service. ACLI believes that the failure to include the phrase "product or service" after the word "marketing" in the proposed rules raises the possibility that the term "solicitation" in the proposed rules could be interpreted to include marketing for items that are not products or services. In addition, ACLI believes that the failure to include the phrase "based upon an exchange of information'' raises the possibility that the definition of "solicitation" in the proposed rules may be construed to include marketing not based on an exchange of eligibility information and consequently, beyond the scope of the rules. In view of the clear language of the statute, ACLI urges that the definition of "solicitation" in the final rules mirror the statutory definition of the term "solicitation."

The proposed rules provide that a company may not use eligibility information to make or send solicitations to a consumer unless the affiliate that provided the infomation has complied with the notice and opt-out requirement. §§ ___.20(a)(1), (b). However, the statute provides that the company may not use the information to market <u>its products and services</u> until the required notice has been provided. By not including the phrase "its products and services," the proposed rules raise concerns about whether the company could send information about the affiliate's products and services. ACLI believes that the Agencies should use the language Congress enacted.

ACLI is also concerned that the preamble misstates when solicitations may be sent on behalf of a company. The preamble states that if a consumer has opted out, a company that has received information from an affiliate may not instruct its affiliate with the preexisting customer relationship to make or send solicitations to the consumer on behalf of the company. 69 *Fed. Reg.* at 42508. ACLI believes that the statement is incorrect. We see nothing in the statute that prevents a company from asking its affiliate that has a customer relationship with a customer to send information to the customer so long as the company is not using the information it received from the affiliate in connection with the solicitation.

Provision of Oval Notice

The Agencies request comment on whether (1) there are circumstances in which it is necessary and appropriate to allow an oral notice, and (2) there exists any practical method for meeting the "clear and conspicuous'' standard in oral notices. ACLI believes that oral affiliate marketing notices are necessary and appropriate when a requirement that notice be provided in writing would substantially delay a customer's transaction, such as when a financial institution and an individual agree over the telephone to enter into a relationship that involves prompt delivery of the insurance product or service. Permitting financial institutions to provide oral notices would appropriately enhance their flexibility in serving their customers. If the Agencies are concerned with ensuring that oral notices meet the "clear and conspicuous" standard and the other requirements for affiliate marketing notices, the proposed rules could be amended to simply require that oral notices be recorded.

Content of Notice – Menu of Opt-Out Choices

Section ___.21(c) provides that a company may allow a consumer to choose from a menu of alternatives when opting out of affiliate use of eligibility information for marketing so long as the company offers "... as one of the alternatives the opportunity to opt out with respect to all affiliates, all eligibility information, and all methods of delivery." Section 214 of the FACT Act provides that the required notice shall allow a consumer the opportunity to prohibit all solicitations referred to in new FCRA § 624(a)(1), and may allow the consumer the opportunity to choose from different options when electing to prohibit the sending of such solicitations. 15 U.S.C. § 1681s-3(a)(2). New FCRA § 624(a)(1) governs marketing solicitations based on an exchange of eligibility information among affiliates. There is no requirement in § 214 that if a company provides a menu of opt-out choices, that the menu must provide the consumer the opportunity to opt out with respect to "all affiliates, all eligibility information, and all methods of delivery." Accordingly, ACLI urges that § ___.21(c) of the proposed rules be adjusted to eliminate this requirement and to mirror the language of FACT Act § 214.

Response Time

The Agencies' proposed rules state that companies should not be required to disclose in their opt-out notices how long a consumer has to respond to the opt-out notice. 69 *Fed. Reg.* at 42510. ACLI supports the Agencies' stance that there should be no such requirement. As the Agencies note, the GLB Act rules do not require such a disclosure, and there have not been any problems associated with those notices. We believe that such a disclosure would confuse consumers into believing that they have only a limited period of time in which to opt out. The amount of additional disclosure that would be required to explain the consumer's options would be cumbersome and excessive. Accordingly, ACLI agrees that no such disclosure be required.

Duration of the Opt-Out

Section ___.25(d) of the proposed rules provides that a former customer's opt-out continues in effect indefinitely unless revoked by the consumer. FACT Act § 214 requires that a consumer's opt-out election remain effective for at least five years and upon expiration of the opt-out period, that the company provide consumers notice and the opportunity to opt out before using the information received from an affiliate to make marketing solicitations. 15 U.S.C. § 1681s-3(a)(3). Section 214 does not require that former customers' elections to opt out remain effective indefinitely. Accordingly, ACLI urges that § ___.25(d) of the proposed rules be adjusted to reflect the language of the statute.

Consumer's Revocation of the Opt-Out

Section ___.25(a) of the proposed rules provides that a consumer may revoke his or her opt-out in writing or electronically. ACLI sees no reason why a consumer should not be permitted to revoke an opt-out orally. Section 214 expressly provides that consumers may request that their opt-outs be revoked. 15 U.S.C. § 1681s-3(a)(3)(A). The requirement that an opt-out be in writing or in electronic form runs counter to the notion that consumers should be permitted flexibility to determine whether to permit companies to use personal information to make marketing solicitations to them. We believe that a requirement that a revocation of an opt-out be in writing or electronic form could disadvantage consumers who, in response to a telephone solicitation, may wish to revoke their opt-outs in order to obtain additional information about the company's products and services. If the Agencies are concerned about ensuring that oral revocation is effective, additional safeguards for documenting the consumer's revocation, such as required recording of the revocation, can be provided by the rules.

Prospective Application Information Received Prior to Date of Compliance of the Regulation

Section ___.20(e) of the proposed rules provides that the restrictions do not apply to eligibility information received by a conipany from an affiliate before the compliance date for the regulation. The FACT Act, however, provides that § 214 restrictions do not apply to information received before the compliance date. It does not require that the information must have been received by the company from its affiliate prior to the effective date. The language of the statute evidences the clear intent of Congress to permit affiliates to continue to share information without regard to § 214 so long as the information was lodged at any affiliate prior to the compliance date. This provision was adopted in recognition that it may be impossible to trace the origin of information obtained prior to the compliance date and which is maintained in a central database. To ensure that companies would have unfettered access to such information (subject to the requirements of FCRA § 603(d)), Congress grandfathered all such information in FACT Act § 214. By contrast, § ___.20(e) of the proposed rules will effectively require massive data exchanges among affiliates prior to the compliance date to ensure that operations are not hampered by the Agencies' arbitrary action. Imposing such a burden and expense on companies would be contrary to Congressional intent evidenced by the clear language of the statute. Accordingly, ACLI urges that § ___.20(e) of the final rules reflect the language of § 214.

Self-Addressed Envelopes

Section ___.23(a)(2) of the proposed rules suggests that a company provides a reasonable and simple method of opting out if it includes a reply form and self-addressed envelope together with the required opt-out notice. ACLI urges that the term "self-addressed envelope" be deleted from the proposals. While we recognize that this is an example of reasonable and simple methods of opting out rather than a requirement, we are concerned that the language will be regarded as a requirement. Our experience with including self-addressed envelopes with notices has been quite negative. Self-addressed envelopes would be directed to the appropriate office of the company that deals with processing opt-out requests. Unfortunately, it is human nature for consumers to use the envelopes to send other information to the company, such as premium payments or change of address notices. The misdirection of such information could have disastrous consequences for consumers, including unavoidable delays and perhaps even lapsed policies. In view of the dangers, we recommend that the Agencies delete reference to including self-addressed envelopes in the final rules.

ACLI appreciates the opportunity to provide its comments to the Agencies. We would be pleased to answer any questions you may have regarding these comments.

Sincerely,

Roberta B. Meyer